PREME COURT, U. S.

FILED
OCT 17 1968
JOHN F. DAVIS, CLERK

NO. 661

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

EDGAR I. SHOTT, JR.,

Petitioner,

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES G. ANDREWS, JR.
Counsel for Petitioner
205 Atlas Bank Building
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — Law Printers — 609 Walnut Street, Cincinnati, Ohio 45202

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement of the case	2
Reasons for allowing the writ	6
Conclusion	11
Appendix	12

CITATIONS

Cases:

Eau Claire National Bank v. Jackman, 204 U.S. 522 (1907)	9
Coleman v. Alcock, 272 F. 2d. 618 (C.A. 5, 1959)	6
Lewis v. Manufacturers Nat. Bank, 364 U.S. 603 (1961)	6
Midland Supply Co. v. Amer. Drilling Co., 302 F. 2d. 128 (C.A. 10, 1962)	6
Moore v. Bay, 284 U.S. 4 (1931)	8
Page v. Rogers, 211 U.S. 575 (1909)	7, 9
Pennington v. Leff, 183 F. Supp. 884 (1960)	10
Pepper v. Litton, 308 U.S. 295 (1939)	8
Rockmore v. Schilling, 72 F. Supp. 172 (U.S.D.C. New Jersey 1947)	7

Statutes:

11 United States Code	
Sec. 29 (e)	5
Sec. 93 (n)	10
Sec. 110 e (1)	2, 5
28 United States Code — Sec. 1254 (1)	1

Miscellaneous:

4 Collier on Bankruptcy 14th Ed. Paragraph 70.94 p. 1775	7

In the

Supreme Court of the United States

October Term, 1968

NO. ———

EDGAR I. SHOTT, JR.,

Petitioner,

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on June 21, 1968.

OPINION BELOW

No printed opinion was filed in this case. The Order of affirmance is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 21, 1968 and the order of

such court denying petition for rehearing was entered on July 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I. May a trustee in bankruptcy, in an action maintained solely by authority of 11 U.S.C. Sec. 110 e (1), (Section 70 e (1) of the Federal Bankruptcy Act), be permitted to recover fraudulent transfers made by the bankrupt, in the absence of proof that, at the time of each such transfer, there was in existence a creditor of the bankrupt having a claim provable against the bankrupt in the bankruptcy proceedings?

II. May a trustee in bankruptcy, in such an action, recover the cumulative total of 600 or more transactions, amounting to $1,354,910.00,thereby intentionally creating a monumental surplus in the bankrupt estate?

THE STATUTE INVOLVED

The pertinent statute is Title 11 U.S.C. Sec. 110 e (1) which provides:

> "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

STATEMENT OF THE CASE

This is the second Petition for Writ of Certiorari filed by petitioner in this case. Originally the district court in Cincinnati granted respondent's motion for summary judgment and entered judgment against Shott for $1,363,410.00.

On appeal, the Court of Appeals for the Sixth Circuit held that the district judge was correct in granting summary judgment "on the legal issue of liability" but vacated the judgment and remanded in this language:

> "The record discloses 600 or more transactions between defendant and the bankrupt, which presumably involved many loans, credits and repayments. The record does not demonstrate to our satisfaction that the cumulative total of $1,363,410.00 is the correct basis for judgment.
>
> The judgment of the district court is vacated and the case is remanded for a redetermination of the amount of the judgment."
>
> 363 F. 2d. 90, 94

Shott's Petition for Writ of Certiorari (No. 546 October Term, 1965, denied December 5, 1966, 385 U.S. 969) questioned only the propriety of granting summary judgment in the circumstances disclosed.

The nature of the transaction which gave rise to the trustee's suit was described in the Sixth Circuit's opinion:

> "The bankrupt inaugurated a scheme wherein he would borrow a sum of money from A, then borrow from B to repay A, borrow from C to repay B and so on. The inducement was a high rate of interest on a short term. This is referred to as a 'Ponzi' type scheme. . . .
>
> Defendant-appellant, Edgar I. Shott, Jr., . . . was a lender to the bankrupt. . . . Millions of dollars were involved in the scheme and it appears that some 120 or more people made loans to the bankrupt in widely varying amounts, aggregating $3,309,462.05.
>
> "The trustee sued the defendant to recover a cumulative total of $1,343,410, (sic) representing some 600 transactions between the defendant and the bankrupt."
>
> 363 F. 2d. 90

"Cumulative total," of course, refers to the fact that, to a large extent, the same dollars were counted each time they changed hands in these 600 plus transactions.

The original pre-trial order limited summary judgment procedure to the "issue of liability" and plaintiff's motion was specifically so limited. Admittedly, none of the affidavits submitted by plaintiff in support of his motion for summary judgment contained the slightest reference to the existence of a creditor having the standing to attack any of these 600 some transactions. On remand, therefore, counsel expected that each of these 600 transactions would be tested by proof that a creditor having a provable claim in the Stickler bankruptcy was a creditor in existence at the time of the transaction and thus, in the absence of bankruptcy, would have had standing to successfully attack the transaction. Surprisingly, not a scintilla of evidence in this regard was offered on trial of the case. At the conclusion of plaintiff's case defendant, therefore, moved for a directed verdict. It was promptly overruled. (R. 64-65, App. 37a-38a)

The trial judge refused to permit defendant to offer the testimony of witnesses in support of the allegations contained in the Amended Answer. (R. 65-66, App. 38a-39a). Defendant, therefore, proffered into the record the following evidence:

> That the total claims filed in the Stickler bankruptcy approximate $400,000.00 of which $374,152.25 represent claims made by persons who participated in the bankrupt's fraudulent scheme. None of the filed claims have been allowed. In addition to the instant action, other actions were instituted by the trustee and are pending against seventeen other individuals, all alleging causes of action identical to those contained in this Amended Complaint, which actions seek recovery in the aggregate sum of $875,377.78. As of February 23, 1967, the trustee had on hand in

the bankrupt estate the sum of $52,036.50. (R. 66-67, App. 39a-40a).

The district judge who presided over the trial was under the impression that the case involved unlawful preferences.

> "Many of the matters that have been argued to this Court for defense will certainly not apply in any way to that four months period."
>
> (R. 15, App. 14a)

In explaining to the jury why he was directing them to return a verdict for the plaintiff in the total sum of $1,354,910.00 he stated:

> "Several questions of law were presented by the defendant. I allowed them to put it in the record so as to protect whatever rights they may have; I don't believe those defenses apply in this case. So I am going to do what we call a directed verdict for the plaintiff. . . ."
>
> (R. 73, App. 41a-42a)

The judge then directed the jury to return a verdict for $264,175 to cover the four months period immediately preceding bankruptcy and $1,090,735 for the period September 19, 1957 to September 18, 1960 for a total verdict of $1,354,910. (R. 74, App. 42a). The trial judge was obviously unaware that plaintiff's causes of action, other than that authorized by 11 U.S.C. Sec. 110 e (1), had been held barred by the two year statute of limitations of 11 U.S.C. Sec. 29 (e). Being totally unaware that he was trying a case authorized solely by Sec. 110 e (1), it's no wonder the judge did not attach significance to the "defenses" inherent in that statute.

On appeal, the Court of Appeals for the Sixth Circuit affirmed, holding that "in the former appeal . . . this

Court decided all issues of liability against appellant . . . . The trustee offered evidence to the effect that appellant received from the bankrupt the sum of $1,354,910 during the period between September 17, 1957, and January 4, 1961. Neither the trustee nor appellant offered any evidence as to loans, credits or repayments." When the Court of Appeals failed to deal with the evidential vacuum as to the existence of a creditor having the standing to attack any of these transactions spanning a three year period, Shott filed a Petition for Rehearing. That Petition was denied, without explanation, on July 19, 1968.

REASONS FOR ALLOWING THE WRIT

I.

In effect, the Court of Appeals has rendered a decision in stark conflict with decisions rendered in both the Fifth and Tenth Circuits, in conflict with the position stated by this Court and in conflict with respected text writers. To permit the trustee to recover the sum total of 600 transfers, which took place over a period in excess of three years, without requiring proof that a creditor represented by the trustee was harmed by such a transfer, is to ignore decisions directly to the contrary in *Coleman* v. *Alcock*, 272 F. 2d. 618 (C.A. 5, 1959) and *Midland Supply Co.* v. *Amer. Drilling Co.*, 302 F. 2d. 128 (C.A. 10, 1962). And although it may be said to be dictum, Mr. Justice Douglas, writing for a unanimous Court in *Lewis* v. *Manufacturers Nat. Bank*, 364 U.S. 603, 608-609 (1961) said:

> "Section 70e enables the trustee to set aside fraudulent transfers which creditors having provable claims could void. The construction of Sec. 70c which petitioner urges would give the trustee power to set

> aside transactions which no creditor could void and which injured no creditor. That construction would enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy."

In the court below Respondent conceded this evidential deficiency but argued that since the bankrupt was admittedly insolvent — "How can there be insolvency without creditors?" But the fact that there *were* creditors in the past is of no moment.

> "In all cases, the trustee proceeding under Sec. 70 (e) must allege and prove that he is asserting the right of some creditor who holds a *provable claim* against the bankrupt and who would have been entitled to avoid the transfer had not bankruptcy intervened."
>
> 4 *Collier on Bankruptcy,* 14th Ed. Paragraph 70.94 p. 1775

As stated in *Rockmore* v. *Schilling,* 72 F. Supp. 172, 175 (U.S.D.C. New Jersey, 1947):

> "It is manifest that if the creditor has been paid off on the claim as it stood at the time of transfer, he may not complain at a future date that he has been injured by the prior transfer."

II.

In approving the intentional creation of a monumental surplus in the bankrupt estate, the decision of the Court of Appeals is in conflict with the philosophy of this Court as expressed in *Page* v. *Rogers,* 211 U.S. 575 (1909). The evidence proffered into the record by defendant established that of the filed claims in the bankruptcy proceedings, which total approximately $400,000.00, $374,152.25 represent claims by those who were participants in the fraudu-

lent scheme. It is significant that although the Stickler bankruptcy proceedings commenced in January, 1961, not one claim has yet been allowed. It seems apparent that the Referee will ultimately disallow those claims filed by participants in the scheme. For example, one such claimant, Richard F. Brower, has filed a claim for $187,750.00. On September 9, 1968 the respondent herein recovered a judgment against Brower for $273,270.00 in one of the seventeen companion cases. Can it seriously be doubted that Brower's claim, and the others like it, will be disallowed. It is well established that bankruptcy courts, in passing on claims, sits as a court of equity and claims may properly be disallowed on equitable grounds. *Pepper* v. *Litton,* 308 U.S. 295 (1939). Assuming the disallowance of the tainted claims, those remaining, if fully allowed, amount to only $26,000.00. The evidence proffered at trial was that the trustee, as of February 23, 1967, had on hand in the bankrupt estate, the sum of $52,036.50. (In a recent newspaper article the trustee reported to now have $85,809.-00 on hand and is quoted as reporting two new settlements totalling an additional $54,643.00.) Obviously, the trustee now has more than adequate funds to pay all legitimate claims plus fees and expenses.

At the time of trial, the trustee had on hand more than twice the amount needed to pay all legitimate claims. Why, then, should he be permitted to attack all 600 separate transactions of Shott with the bankrupt in order to intentionally create a huge surplus? In the court below, the trustee claimed that he was *required* to do so by *Moore* v. *Bay,* 284 U.S. 4 (1931). That case merely holds that if a transfer or obligation is voidable at all, it is voidable in toto, without regard to the amount of the creditor's claim. Thus, in the instant case, if we were dealing with but one transaction in the amount of $1,354,910.00, the

amount of the judgment entered below would be correct. But we are dealing with more than 600 separate transactions which occurred over a period exceeding three years. Assume that at the time of trial the trustee had no assets in the bankrupt estate. Why should he be allowed to set aside transactions, admittedly valid between the parties, to produce more funds than necessary to pay all legitimate claims and expenses?

This Court has held that when the trustee sues in a *state* court, the defendant may not litigate the question of the validity of the claims against the bankrupt, for, to permit it: "would transfer the administration of a bankrupt's estate from the United States District Court to the state court." *Eau Claire National Bank* v. *Jackson,* 204 U.S. 522, 538 (1907). Where, as here, the proceedings are had in the bankruptcy court itself, a different rule prevails. In *Page* v. *Rogers,* 211 U.S. 575 (1909) this Court commented favorably on the decree entered by the court below in these words:

> "The theory upon which the decree proceeded was, that no greater sum should be required of the defendant than would be needed to meet the amount of the claims proved or provable against the bankrupt and the cost and expenses of the administration of the bankrupt estate. including fees of counsel for the trustee. . . ."
>
> (580)

> "In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by a judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend."
>
> (581)

The fundamental fairness of such a doctrine is apparent. For example, in *Pennington* v. *Leff,* 183 F. Supp. 884 (1960), the Trustee brought suit to recover $63,620.50 in voidable preferences. The court granted judgment for only $9,440.29 stating:

> "The benefits of the bankruptcy statutes inure to debtor and creditors, and to the trustee only as he represents the interests of both. No useful purpose would be served in compelling these defendants to pay into the bankrupt estate an amount far in excess of the filed claims and also in excess of the amount which, if paid, would have prevented any necessity of bankruptcy. It is not the purpose of bankruptcy proceedings to punish, but to see that substantial justice is granted to all creditors."
>
> p. 890

In the court below, counsel for the trustee sought to justify the intentional creation of a huge surplus by relying on Section 57 (n) of the Bankruptcy Act (11 U.S.C. Sec. 93 (n)). While that section provides some method for dealing with a surplus which might occur, it is no authority for the proposition that a surplus should be created. As applied to Shott, it provides that if he first pays the entire judgment of $1,354,910.00, he may then participate to some extent in the surplus thus created. From a practical standpoint, therefore, Shott would be rendered bankrupt, and, at the same time, precluded from participating in the surplus he helped create.

In the last analysis, it was the duty of the trustee and his counsel to try to realize sufficient assets to pay approximately $26,000.00 in bona fide claims. On March 20, 1963, when the original complaint was filed by the trustee against Shott, it alleged that the trustee then had on hand the sum of $23,000.00. Yet the prayer was for $1,363,410.00! When the case came to trial the trustee had on

hand more than double the amount needed to pay all legitimate claims in full. Yet a judgment was entered for $1,354,910.00. It now appears that the trustee has in his fund, or secured to be paid, the sum of $140,452.00. It is submitted that when this needlessly created pie is finally cut up, the results will shock this Court and the public conscience as well.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES G. ANDREWS, JR.

Counsel for Petitioner

205 Atlas Bank Building
Cincinnati, Ohio 45202

APPENDIX

No. 17,966

In The
UNITED STATES COURT OF APPEALS
for the Sixth Circuit

THOMAS A. CONROY, Trustee in Bankruptcy
for LESLIE D. STICKLER, Bankrupt,
Plaintiff-Appellee,

v.

EDGAR I. SHOTT, JR.,
Defendant-Appellant.

(Filed June 21, 1968)

ORDER

Before WEICK, Chief Judge, EDWARDS and PHILLIPS, Circuit Judges.

This is the second appeal in this case from the United States District Court for the Southern District of Ohio. In the opinion in the former appeal, reported at 363 F.2d 90, cert. denied, 385 U.S. 969, this Court decided all issues of liability against appellant and in favor of the trustee in bankruptcy. The case was remanded to the District Court for a redetermination of the amount of the judgment by the following language:

> "The record discloses 600 or more transactions between defendant and the bankrupt, which presumably involved many loans, credits and repayments. The record does not demonstrate to our satisfaction that the cumulative total of $1,363,410 is the correct basis for judgment.
>
> "The judgment of the district court is vacated and the case is remanded for a redetermination of the amount of the judgment." 363 F.2d at 94.

After the announcement of the decision of this Court, a jury trial was held to determine the amount of appellant's liability. The trustee offered evidence to the effect that appellant received from the bankrupt the sum of $1,354,910 during the period between September 17, 1957, and January 4, 1961. Neither the trustee nor appellant offered any evidence as to loans, credits or repayments. The District Judge thereupon directed a verdict in favor of the trustee in the amount of $1,354,910.

Since appellant failed to offer proof as to credits or payments, if any, to which he may be entitled, we hold that the District Judge did not err in directing a verdict.

It is ORDERED that the judgment of the District Court be and hereby is affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS
CLERK

Issued as Mandate: August 14, 1968
COSTS: NONE

A True Copy.

ATTEST:
Carl W. Reuss, Clerk

By /s/ GRACE KELLER
Chief Deputy

A True Copy of the Original Filed August 15, 1968.

Attest: JOHN D. LYTER, Clerk

By /s/ SUZANNE D. McGONEGLE Deputy

Certified August 15, 1968.

LIBRARY
EME COURT, U. S.

No. 661

FILED
NOV 13 1968
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

EDGAR I. SHOTT, JR.,

Petitioner,

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

J. VINCENT AUG
S. ARTHUR SPIEGEL
Atlas Bank Building
Cincinnati, Ohio 45202
Counsel for Respondent.

Of Counsel:
WILLIAM H. NIEMAN
1005 Atlas Bank Bldg.
Cincinnati, Ohio 45202

JAMES G. ANDREWS, JR.
205 Atlas Bank Building
Cincinnati, Ohio 45202
Counsel for Petitioner

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	5
I. Did the United States District Court properly direct a verdict for plaintiff appellee (a) where the liability of defendant appellant had been previously determined (b) where plaintiff appellee introduced uncontroverted evidence of 600 or more transactions in fraud of creditors between defendant appellant and the bankrupt representing a cumulative total of $1,354,910.00 and (c) where defendant appellant failed to offer any evidence as to "loans, credits or repayments" to which he may have been entitled?	5
II. Was it proper for the United States District Court to base its directed verdict on the cumulative total of 600 or more transactions amounting to $1,354,910.00 where defendant appellant offered no evidence as to credits or payments, if any, to which he may have been entitled and where defendant appellant raises the conjectural proposition that such a judgment intentionally creates a "monumental surplus in the bankrupt estate."	10
Conclusion	18

TABLE OF AUTHORITIES

Cases Cited:

Davis v. Gates, (D.C. Pa.) 37 Am. B. R. 818, 235 Fed. 192	15
Edwards v. Monning, 137 O. S. 268, 28 N. E. 2d 627 (1940)	10
Evans v. Lewis, 30 O. S. 11 (1877)	10
Moore v. Bay, 284 U.S. 4, 52 S. Ct. 3, 76 L. Ed. 133	16
Page v. Rogers, 211 U.S. 575, (1909)	16, 17
Pepper v. Litton, 308 U.S. 295	11
Webb v. Roff, 9 O.S. 430 (1859)	10

Page

Statutes:

Sec. 57 N, National Bankruptcy Act (11 USC. 93) .. 12
Section 70e (2) Federal Bankruptcy Act 14, 16

Texts:

Collier on Bankruptcy, Volume 4, 14th Ed. 15, 16
25 Ohio Jurisprudence 2d 525, Fraudulent Conveyances, Paragraph 100 10

In The

Supreme Court of the United States

October Term, 1968

No. 661

EDGAR I. SHOTT, JR.,

Petitioner,

vs.

THOMAS A. CONROY, Trustee in Bankruptcy for Leslie D. Stickler, Bankrupt,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. Did the United States District Court properly direct a verdict for plaintiff appellee (a) where the liability of defendant appellant had been previously determined, (b) where plaintiff appellee introduced uncontroverted evidence of 600 or more transactions in fraud of creditors between defendant appellant and the bankrupt representing a cumulative total of $1,354,910.00 and (c) where defendant appellant failed to offer any evidence as to "loans, credits or repayments" to which he may have been entitled?

The United States District Court and the United States Court of Appeals for the Sixth Circuit answered this question, "Yes". Plaintiff appellee contends these answers were correct.

II. Was it proper for the United States District Court to base its directed verdict on the cumulative total of 600 or more transactions amounting to $1,354,910.00 where defendant appellant offered no evidence as to credits or payments, if any, to which he may have been entitled and where defendant appellant raises the conjectural proposition that such a judgment intentionally creates a "monumental surplus in the bankrupt estate."

> The United States District Court and the United States Court of Appeals for the Sixth Circuit answered this question, "Yes". Plaintiff appellee contends these answers were correct.

STATEMENT OF THE CASE

This is an appeal by defendant appellant, Edgar I. Shott, Jr., from a judgment rendered on a directed verdict in the amount of $1,354,910.00. The Court of Appeals for the Sixth Circuit had previously[1] vacated the judgment of the District Court which had granted summary judgment against the appellant in the amount of $1,363,410.00 and remanded the case for redetermination of the amount of the judgment for the reason that:

> "The record discloses 600 or more transactions between the defendant and Bankrupt which, presumably, involved many loans, credits and repayments. The record does not demonstrate to our satisfaction that the cumulative total of $1,363,410.00 is the correct basis for judgment." (App. 8b #17966)

and, consequently, there was a genuine issue as to material fact with respect to the amount of judgment to which the Trustee was entitled against Mr. Shott.

---

[1] 363 F. 2d 90.

Following the announcement of this Court's decision, a conference between counsel and the Honorable John W. Peck, who had previously granted the summary judgment in the amount of $1,363,410.00, was held on January 4, 1967, at which a record[2] was made to determine the method of proceeding in accordance with the mandate of this Court. Thereafter, a jury trial was held before the Honorable Carl W. Weinman, Chief Judge of the Federal District Court for the Southern District of Ohio, Western Division, at Dayton, Ohio, on April 4 and 5. At the beginning of the trial (R 14, App. 41b #17966) Judge Weinman ordered that the following material would be made part of the record of the proceeding before the Court because of the unusual nature of the case:[3]

(a) Record of the pre-trial conference of September 30, 1964, between counsel and the Honorable John W. Peck, District Judge (App. 11b #16489).

(b) Memorandum, Opinion and Order of the Honorable John W. Peck filed January 26, 1965 (App. 30a #16489).

(c) Opinion of the United States Court of Appeals for the Sixth Circuit in Appeal No. 16489, Conroy, Trustee vs. Shott, decided July 8, 1966 (App. 1b #17966).

(d) Transcript of the conference between counsel and the Honorable John W. Peck on January 4, 1967 (App. 9b #17966).

---

[2] The transcript of said conference of January 4, 1967, is set forth in App. 9b et seq. #17966.

[3] By order of this Court on September 13, 1967, Plaintiff-Appellee was allowed to incorporate by reference the Briefs and appendices in the previous appeal #16489. References to appendices will distinguish between the two appeals by setting forth the appropriate case numbers.

Plaintiff appellee in the second trial presented testimony and exhibits supporting the fact that Mr. Shott received from the Bankrupt for the period from September 17, 1957, to January 4, 1961, $1,363,410.00. Defendant appellant neither cross examined plaintiff appellee's witnesses (R 21, App. 18a and R 64, App. 61b #17966), nor offered any evidence or exhibits concerning "loans," "credits," and/or "repayments." The proffer (R 66, App. 39a #17966) made by defendant-appellant did not involve loans, credits and/or repayments, but was concerned with the activity of the Trustee in Bankruptcy in realizing an estate for the creditors of the Bankrupt Stickler, as well as the amount of proofs of claim on file in the bankruptcy.

Judge Weinman, consequently, had no alternative but to direct a verdict for the plaintiff in the amount of $1,354,910.00 (R 74, App. 42a #17966), being the amount of payments as represented by canceled checks from the Bankrupt Stickler to "Edgar I. Shott, Jr.," "Edgar I. Shott, Jr., Attorney," and "Shott Investment Company" introduced in evidence by the plaintiff through Thomas A. Conroy, Trustee in Bankruptcy, as well as John E. Shriver, certified public accountant, expert witness retained by the Trustee pursuant to order of the referee in bankruptcy and who reconstructed and analyzed the Bankrupt's financial dealings with the defendant (R 51, App. 34a and R 59, App. 37a #17966). The defendant did not appear at the trial (R 16, App. 42b and R 68, App. 61b #17966), although plaintiff had issued a subpoena for his appearance as well as the production of his records, and had called for his testimony as on cross examination.

On March 29, 1967, several days before the scheduled jury trial before Judge Weinman, the defendant filed his Answer to the Amended Complaint (App. 10a #17966). On March 30 plaintiff filed his Motion to Strike from the

Answer to the Amended Complaint (App. 37b #17966). The significance of these facts will be noted later in the Brief.

The Amended Complaint (8b #16489) of plaintiff appellee asserts that at the "commencement of the bankruptcy proceedings Stickler was indebted to creditors in an amount in excess of $2,000,000.00 and that this defendant was listed as one of said creditors, and that the said Stickler had less than $2,000.00 in cash on hand at the commencement of said bankruptcy proceedings".

The bankruptcy proceedings giving rise to this action have not been concluded. No claims have been allowed or rejected as yet, nor have any fees or expenses in the administration of the bankrupt's estate been determined. There have been a number of actions filed by the Trustee in the United States District Court against others who are in a similar position to that of defendant appellant and a number of settlements have been negotiated.

In excess of $1,600,000.00 in claims have not yet been presented in the bankruptcy proceedings, which under the authority of Section 57 n of the National Bankruptcy Act may be filed hereafter.

REASONS FOR DENYING THE WRIT

I. Did the United States District Court properly direct a verdict for plaintiff appellee (a) where the liability of defendant appellant had been previously determined, (b) where plaintiff appellee introduced uncontroverted evidence of 600 or more transactions in fraud of creditors between defendant appellant and the bankrupt representing a cumulative total of $1,354,910.00 and (c) where defendant appellant failed to offer any evidence as to "loans, credits or repayments" to which he may have been entitled?

Defendant appellant is attempting to assert a conflict between the Fifth and Tenth and Sixth Circuits with respect to the law requiring proof of a creditor in existence at the time of the challenged transactions under Section 70 e of the National Bankruptcy Act. This distorts the position of the District Court and Appeals Court in this matter and is completely erroneous. The District Court and the Court of Appeals in finding in favor of plaintiff appellee on the issue of liability have found that the required creditors did exist.

The argument made by defendant appellant here has been made before in this case in various forms. It was raised in the first appeal to the Court of Appeals where defendant appellant challenged plaintiff appellee's right to a summary judgment. See appellant's Brief pp. 6 #16489 and appellee's Answer Brief pp. 5 #16489. The Court of Appeals affirmed the position of the District Court on the question of liability and vacated the judgment only for the purpose of redetermining the amount of the judgment. The Supreme Court in refusing to grant certiorari from that decision once and for all removed that question from consideration in this case, yet defendant appellant still insists on raising the issue.

To illustrate that the question of whether "at the time of each such transfer, there was in existence a creditor of the bankrupt having a claim provable against the bankrupt in the bankruptcy proceedings" has been disposed of in the original proceedings, note the memorandum opinion and order of Judge John W. Peck, the District Court Judge, where Judge Peck found that:

> "Stickler's scheme was the essence of simplicity, not to say of stupidity. At its inception he borrowed from A, then borrowed from B to repay A. The inducement to B was a high rate of interest on a short term, whereupon it became necessary to borrow from C

> to repay B. This operation continued, with ever increasing rates of interest and shortening of the loan periods, until hundreds of transactions involving millions of dollars had been entered into by Stickler. However, since he was insolvent from the moment of the making of the first loan, and since there has never been a suggestion that any source of income existed except new loans (if such may be considered a 'source of income'). * * *." (App. 32a #16489)

How can there be insolvency without creditors? Also, note other relevant finding of Judge Peck:

> "Since some reference has been made to other lenders of money to Stickler, whose relationships to the plaintiff would vary from this defendant's only to the extent that their loans had been repaid, mention should be made of the fact that Stickler had other creditors whose claims arose out of completely different classes of obligations, as for example, the purchase by Stickler of items of personal property." (App. 35a #16489)

The Court of Appeals adopted Judge Peck's opinion on the question of liability (363 F 2 90), the Supreme Court refused certiorari (#586 Oct. Term 1966) on this question on the first appeal from the Sixth Circuit. Thus the question which defendant appellant is raising here has already been disposed of in the earlier proceedings.

For further illustration with respect to this matter, an analysis of the defendant's Brief in the previous appeal indicates that there were four basis upon which he was seeking a reversal. Three concerned themselves with the question of liability and the fourth with the amount of the judgment. Upon the question of liability, he raised the problems of not only the proof of the actual existence of a creditor, but also proof of fraudulent intent and knowledge of fraudulent intent. These all go to the question of liability.

It is interesting to note that both in the pre-trial conference of September 30, 1964 (App. 11b #16489), as well as in the conference held following the decision in #16489 on January 4, 1967 (App. 9b #17966), defendant-appellant's counsel did not raise the question of the proof of the actual existence of a creditor having a provable claim as a contested issue of fact in these proceedings. Actually, in the first conference counsel for defendant-appellant conceded that this was not an issue:

> "THE COURT: I am talking about the creditors of the Bankrupt estate. Isn't that plain? Of course I think you can satisfy what is in my mind. If we are only talking about creditors similarly situate, then we start in the realm of equity.
>
> "I think, based on some of the statements in the plaintiff's pre-trial statement, they do everything but talk about balancing equities. They talk about unjust enrichment and quite a number of things in that area. If it were a fact that we are only talking about people that were involved in this get rich-quick scheme, I was wondering whether there was any defense available on that ground. But if there are any or even any, much less substantial, creditors who did not participate in this, I don't think we have to discuss that at all. Incidentally, defendant does not raise that point anyway.
>
> "MR. ANDREWS: (Shaking head)." (App. 14b #16489)

No doubt the foregoing language is one of the bases upon which Judge Peck concluded:

> ". . . that Stickler had other creditors whose claims arose out of completely different classes of obligations, as for example, the purchase by Stickler of items of personal property." (App. 36a #16489)

At the conference of January 4, 1967 between all counsel and Judge Peck, the only factual issue raised by defen-

dant-appellant's counsel which could be resolved by a jury, aside from the question of the number and amount of payments (App. 32b #17966), was whether at the time the defendant-appellant received each payment from the Bankrupt he had the requisite knowledge of the Bankrupt's fraudulent intent (App. 14b #17966). But no question is being raised on the "knowledge" question in this appeal; and there was no cross examination or opposing evidence introduced by defendant-appellant to counter appellee's evidence as to number and amount of payments to Shott. At no point in the conference did the defendant-appellant's counsel intimate that there was any question concerning proof of the actual existence of a creditor.

Note also that the Answer of defendant-appellant filed on March 29, 1967, which in paragraph 8 of the Second Defense states:

> "Defendant admits that the Bankrupt, Stickler, inaugurated a scheme several years prior to his bankruptcy whereby he borrowed from numerous individuals substantial sums of money upon which he promised to pay exhorbitant interests far in excess of the legal rate as established by the Ohio Revised Code; that at all times from the inauguration of such scheme until the judication in bankruptcy, said Stickler was insolvent. * * *"

is an admission that there were creditors because it is obvious there can be no insolvency unless there are creditors.

The purpose of reviewing the pre-trial conference of September 30, 1964, the conference of counsel and the Court January 4, 1967, the findings of fact contained in the Memorandum, Opinion and Order of Judge Peck filed on January 26, 1965, which was substantially incorporated by reference and set out in the decision of the Court in the former appeal in case No. 16489, and

made a part of the record in the second trial before Judge Weinman, is to show factually that there was no contested issue of fact concerning "the actual existence of a creditor having a provable claim" and that such claim is without merit.

Can there be any doubt about the existence of a creditor, where the Amended Complaint alleges the fraudulent scheme and Stickler's insolvency from the beginning, the Answer admits such fact, the District Court found such facts to exist, and the finding was included in the Court of Appeals Opinion in No. 16489. Since Stickler was insolvent from the beginning, there was no time thereafter when there were no creditors being defrauded by his payments to Shott. Moreover, under applicable Ohio laws a subsequent creditor, such as those referred to in defendant-appellant's Answer at App. 11a #17966, may also avoid fraudulent transfers, where actual intent to defraud is shown — as it has been found to exist in this case: *Webb* v. *Roff*, 9 O.S. 430 (1859); *Evans* v. *Lewis*, 30 O. S. 11 (1877); *Edwards* v. *Monning*, 127 O. S. 268, 28 N. E. 2d 627 (1940); 25 Ohio Jurisprudence 2d 525, Fraudulent Conveyances, Paragraph 100.

II. Was it proper for the United States District Court to base its directed verdict on the cumulative total of 600 or more transactions amounting to $1,354,910.00 where defendant appellant offered no evidence as to credits or payments, if any, to which he may have been entitled and where defendant appellant raises the conjectural proposition that such a judgment intentionally creates a "monumental surplus in the bankrupt estate."

Defendant appellant has consistently throughout these proceedings presented himself as a phrase maker, the most recent of which uses the words "intentional creation of

a monumental surplus in the bankrupt estate". No justification for the use of this phrase exists and no factual situation is present to warrant its use. Defendant appellant is correct when he states approximately $400,000 in claims have been filed on the bankrupt estate. No basis exists for his conclusion that a substantial portion of the claims will be disallowed. As to claims filed by the creditors who had dealings with the bankrupt, defendant appellant would summarily dispose of their claims with a broad sweep of the applicability of the rule of *Pepper* v. *Litton* 308 U.S. 295. All without a hearing we presume on the basic merits of each claim.

It is interesting to note that the National Bankruptcy Act does not prevent those who have participated in fraudulent transfers and preferences from having claims allowed on an "equitable" theory. Rather, the Act specifically provides in Section 57 n for the filing of claims by persons who have had transactions avoided. Thus, the assumption that the Referee will disallow claims in such significant amounts as to create a monumental surplus is not warranted by the law or the facts of this case. The posture of the bankrupt proceedings in this case at the present time is such that the assets realized to date are insignificant in proportion to the obligations of the bankrupt estate. Any representation by the defendant appellant to the contrary is a last ditch effort on his part to mislead this Court.

The Court, the defendant appellant and the plaintiff appellee all know that a judgment is one thing, its collection another. What the ultimate status of the bankruptcy estate will be is still far from being determined and defendant appellant by raising the question of a surplus at this time is raising a question which the legislature has decreed should be handled by the Bankruptcy Court. The

provisions of Section 57 n provide for the handling of a surplus if any should ever arise.

> "When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the Court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case." Sec. 57 N National Bankruptcy Act (11 USC 93).

Defendant appellant in a totally unwarranted and unsubstantiated comment at the end of his brief states that "when this needlessly created pie is finally cut up, the results will shock this Court and the public conscience as well."

We do not presume to understand the full impact of this comment, nor where the Courts and the Referee in Bankruptcy would be while this was going on, but if the inference is that counsel and trustee are improperly performing the obligations of their offices, the comment is wholly unsubstantiated, unethical and calls for an apology on the part of counsel for Petitioner.

It should be observed that neither the Trustee nor his counsel in the Stickler bankruptcy have received any compensation from the commencement of the bankruptcy proceedings to the date of the preparation of this Brief. Judge Peck in his Memorandum, Opinion and Order recognized that the Trustee and his counsel were attempting to carry out their assigned responsibility under the Bankruptcy Act when he observed:

> "In prosecuting this action, as in pursuing other assets of the Bankrupt including claims against other creditors in defendant's category, the plaintiff Trustee is carrying out his assigned responsibility of creating a fund in which properly proven claimants may participate." (App. 36a #16489)

Actually, the slurring comment of counsel for defendant appellant obliquely raises the question that was before Judge Weinman in handling this Court's mandate. On March 29, 1967, defendant appellant filed his Answer to the Amended Complaint (App. 10a #17966), and on the following day plaintiff appellee moved to strike certain language from said Answer. The issues raised by the Motion to Strike (App. 37b #17966), went to the heart of the proceedings on the remand from this Court.

For instance, the First Defense in the Answer asserted that the complaint failed to state a claim upon which relief could be granted. The Motion to Strike this Defense was based upon the decision in the former appeal affirming on the question of liability. Moreover, the Second Defense denied plaintiff appellee's capacity to sue, and asserted that plaintiff appellee had on hand assets in the Bankrupt estate in excess of the provable and allowable claims then on file in the bankruptcy, as well as alleging that all participants in the fraudulent scheme, which defendant appellant admitted existed, be treated alike. The Motion to Strike that portion of the Answer concerning the amount of the assets on hand in the Bankrupt's estate, the proofs of claim on file, as well as the material contained in the Fourth Defense of the Answer which concerned itself with other action by plaintiff appellee, was grounded on the premise that such material was not relevant to the number and amount of fraudulent transfers received by the defendant appellant from the Bankrupt. This Court had previously upheld plaintiff appellee's capacity and authority to sue.

Judge Weinman recognized that such defenses were irrelevant to the problem presented to him by the pleadings and past proceedings in this case when he stated:

> "I don't think that these defenses that you have here apply in this case, but I will allow you to protect your recrod [sic] in that respect." (App. 38a #17966)

The hearing before Judge Weinman, therefore, was confined to the issue stipulated by this Court in the previous appeal to wit: Whether defendant appellant was entitled to any allowances by reason of any "loans," "credits" and/or "repayments" in the "600 or more transactions between the defendant and the Bankrupt"; and in support of the issues, plaintiff appellee produced testimony and exhibits to establish the maximum he was entitled to recover, but defendant appellant neither cross examined nor offered any testimony to support his right to a reduction by reason of "loans," "credits" and "repayments."

In support of the correctness of the District Court's position that matters referring to the amount of provable claims on file, the amount that the Trustee had realized in the Bankruptcy estate account, the number and status of pending suits against other participants in the investment scheme, etc., were not relevant to the issue of the right of the plaintiff appellee to recover from the defendant appellant, are the provisions of Section 70e (2) of the Federal Bankruptcy Act, which refers to fraudulent transfers:

> "The property of the debtor affected by any such transfer shall be and remain a part of the assets and estate, discharged and released from such transfer and shall pass to, and every such transfer and obligation *shall be avoided by the trustee* for the benefit of the estate. * * *" (emphasis ours)

Here, the Trustee is specifically commanded to avoid fraudulent transfers. Nowhere in the Bankruptcy Act is there any provision limiting the obligation of the Trustee in avoiding such transfers, to the value of the proofs of claim filed in the proceedings. In fact, as pointed out above the Bankruptcy Act recognizes the real possibility that the Trustee may realize assets in excess of the value

of the proofs of claim and, specifically, provides for the method for distribution of such surplus under Section 57 n. As set forth in Volume 4, *Collier on Bankruptcy,* 14th Ed. in paragraph 70.94 at page 1775:

> "Thus, although there are some early cases to the contrary, the prevailing rule is that the trustee need not, under Section 70 e, allege or prove the filing or allowance of claims in the bankruptcy proceedings. Requirement of such a showing can be implied neither from the Bankruptcy Act, nor from the Non-Bankruptcy Law that may be invoked by the trustee in actions brought under the subdivision, and application of such a requirement might seriously embarrass the efforts of a receiver or trustee to recover fraudulently transferred property before it could be dissipated. Furthermore, under the present provisions of Section 57 n regarding the filing of late claims, the fact that at the time of suit there were no claims either filed or allowed against the estate, even where the original six months period had expired, would not foreclose the possibility that claims might be presented and allowed thereafter under certain circumstances."

Furthermore, at page 1796, the textwriter points out: "Whether there are any other creditors who will share in the distribution of the estate is no concern of the trial court in a suit under Section 70e is but an extention of this view that where the trustee asserts a good cause of action based on Section 70 e the fact that there may be a surplus in the estate over and above the claims of creditors is not a valid basis for limiting the amount of the recovery in the trial court." As pointed out in *Davis* v. *Gates,* (D. C. Pa.), 37 Am. B. R. 818, 235 Fed. 192. The Court stated in analyzing Sections 70 a and e of the Bankruptcy Act:

> "Power is thus conferred upon a trustee to recover all the property transferred in fraud of creditors, al-

> though such recovery may result in the possession by the trustee of property in excess of the entire indebtedness of the bankrupt. It is manifestly impracticable in all cases to determine in advance the exact amount or proportion of the property fraudulently transferred, or its value, it is necessary that it should be received by a trustee to insure the payment in full of the bankrupt's indebtedness; and further, if the result of the recovery by a trustee would be to put in his possession assets more than sufficient to insure such payment in full, any surplus would be turned over under the direction of the court to the transferee or other as justice might require."

The Supreme Court of the United States in *Moore* v. *Bay*, 284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133, held that the extent of the Trustee's recovery in such an action is not measured by the creditor's right. As noted in *Collier's* page 1800, "Since the decision in the Bay case, no dissenting voice has been raised by the courts. The accepted rule is that in a suit under Section 70e, if the transfer or obligation is voidable at all, it is voidable *in toto*."

Thus, rather than "seeking to create a monumental surplus for the sole purpose of obtaining huge fees," as charged by defendant appellant, the Trustee "is carrying out his assigned responsibility of creating a fund in which properly proven claimants may participate," as noted by the District Court.

Defendant appellant cited *Page* v. *Rogers* 211 U.S. 575 1909, for the proposition that the United States District Court, as the Bankruptcy Court, may determine the net amount to be recovered from defendant appellant in order to avoid the "circuitous proceedings of compelling the defendant to pay into the Bankruptcy Court the full amount * * * which he has received, and then to resort to the same court to obtain part of it back by way of

dividend" (211 U.S. 581) Note, however, that in *Page* v. *Rogers,* the bankruptcy proceedings were completed, the determination of the amount necessary to be realized to pay creditors and expenses of administration having been determined. Recognizing these facts, the Court stated at page 511:

> "Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he has received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors * * *. In view of the fact that this suit was brought in the Bankruptcy Court itself, and the final decree is to be entered by the Judge of that Court, it is entirely practicable to avoid the circuitous proceedings of compelling the defendant to pay into the Bankruptcy Court the full amount of the preference which he has received, and then to resort to the same Court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, the Bankruptcy Court then may settle the amount of the dividend coming to him and the final decree may direct him to pay over the full amount of his preference, with interest less the amount of his dividend. * * *"

Assuming *Page* v. *Rogers* to be the law today, the facts in the instant case are not analogous to those in *Page* v. *Rogers* because no determination has been made of the amount necessary to satisfy the claims of creditors or the expenses of administration, nor has final time for the filing and proof of all claims expired.

Furthermore, *Page* v. *Rogers* concerns preferential transfers, which have traditionally been given more favorable treatment under the law than fraudulent transfers, and finally, it should be noted that the case was decided under the Bankruptcy Law of 1898 as then in effect, which made

no provision for the contingency of a surplus as does the present Act.

CONCLUSION

In this Petition for Writ of Certiorari defendant appellant contends that there was an absence of proof of a fundamental requirement of our cause of action. His second contention is that a judgment which creates a surplus in a bankrupt estate is invalid. Our comments above have shown the fallacy of both contentions. It should be further noted that neither of his propositions in any sense approach the standards of Rule 19 of the Supreme Court Rules (Conditions governing review on Certiorari). The defendant appellant has had his case before the District Court twice, the Sixth Circuit Court of Appeals twice, and is now before the Supreme Court for the second time. He has had his days in Court and nothing exists in the contentions raised by him that should challenge the discretion of the Supreme Court.

We are confronted with the unusual situation where the defendant appellant claims failure or proof of a material fact alleged in the Amended Complaint (Par. 9 App 7 a #17966) which he did not deny, but, in fact, in his Answer, conceded, by admitting the existence of the scheme and the insolvency of the bankrupt from the beginning, and by alleging that there were proofs of claim on file in the bankruptcy representing claims of creditors other than participants in the scheme (See Par. 2 Second Defense and Third Defense App. 11a #17966).

We have the further anomaly in these proceedings where the defendant appellant questions the probative value of plaintiff appellee's proof when he neither tested it by cross examination or sought to rebut it by testimony of his own.

It is submitted that for the reasons stated herein, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. VINCENT AUG
1005 Atlas Bank Building
Cincinnati, Ohio 45202

S. ARTHUR SPIEGEL
301 Atlas Bank Building
Cincinnati, Ohio 45202
Attorneys for Plaintiff-Appellee

Of Counsel

WILLIAM H. NIEMAN
1005 Atlas Bank Building
Cincinnati, Ohio 45202